CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 288.

CITIZENS BANKING COMPANY

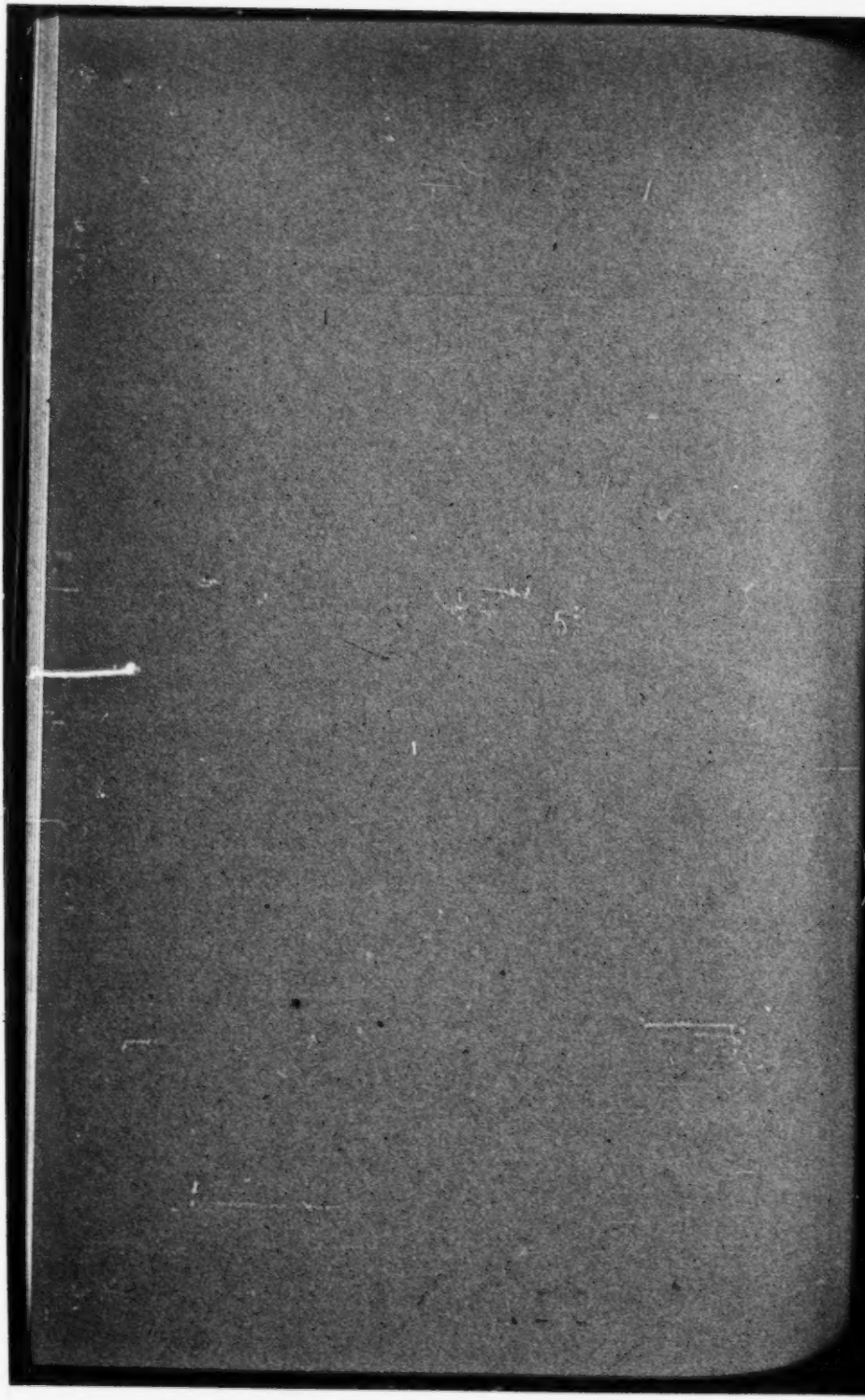
vs.

AVENNA NATIONAL BANK OF RAVENNA, OHIO, AND CORA M. CURTIS.

N A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JUNE 28, 1912.

(23,269)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 16, 1914.

1 United States Circuit Court of Appeals, Sixth Circuit.

No. 2193.

CITIZENS' BANKING COMPANY, Appellant,
vs.
RAVENNA NATIONAL BANK OF RAVENNA, OHIO, and CORA M. CURTIS, Appellees.

On the hearing of this cause, questions arose for the proper decision of which this court desires the instruction of the Supreme Court. The facts upon which the questions arise are as follows:

August 10, 1908, the Ravenna National Bank filed, in the United States District Court for the Northern District of Ohio, its petition in bankruptcy against Cora M. Curtis. The petition included every allegation necessary to require an adjudication of bankruptcy, unless upon the point whether the defendant had committed an act of bankruptcy; and upon this subject, its sole allegation was as follows:

"That the said Cora M. Curtis is insolvent, and that within four months next preceding the date of this petition, she committed the following acts of bankruptcy, to-wit:

(*a*) On April 9, 1908, the respondent suffered and permitted the Citizens' Bank of Norwalk, Ohio, to recover a judgment against her for $1,598.78 and costs, by the consideration of the Common Pleas Court of Erie County, Ohio; that on April 9, 1908, execution was issued and levied on the real estate owned by respondent, in Norwalk, Ohio; that subsequently, said execution was levied on the real estate of respondent in Toledo, Ohio.

2 (*b*) That on or subsequent to April 9, 1908, the respondent suffered and permitted the First National Bank of Fremont, Ohio, to recover a judgment against her for $3,034.66 and costs, by the consideration of the same court; that on April 11, 1908, an execution was issued thereon and levied on the real property of respondent which was situated in Norwalk, Ohio; that shortly thereafter an execution on said judgment was levied on the real property of respondent which is situated in Toledo, Ohio.

(*c*) That the said respondent suffered the Huron Banking Company, of Norwalk, Ohio, to recover a judgment against her for $3,678.12, and costs, by the consideration of the same court, said judgment having been rendered subsequent to April 9, 1908; that on April 16, 1908, an execution on said judgment was duly issued and levied on the real estate of respondent.

That by the acts of bankruptcy aforesaid, the respondent suffered and permitted the three judgment creditors above mentioned to obtain preferences; that respondent has not, at any time, vacated or discharged said preferences or any part thereof."

To this petition respondent demurred, but later withdrew her demurrer and filed an answer, admitting that she was insolvent at the time of filing the petition and stating her willingness to be adjudged

a bankrupt "on the grounds mentioned in the petition herein as well as on the ground afforded by this answer." While her demurrer was pending, the First National Bank of Fremont, one of the alleged preferred creditors, filed its paper saying that it

"herewith excepts and demurs to the petition filed, herein, for the reason that the same is wholly insufficient in law, and that the same discloses no act of bankruptcy committed by the said respondent."

During the same time, the Citizens' Banking Company, another alleged preferred creditor, being in default, tendered, for filing, its answer, in which it alleged the rendition of its judgment as stated in the petition, and that the judgment was in full force and wholly unsatisfied, and denied that the respondent, Cora M. Curtis, had committed any act of bankruptcy and averred that the petition disclosed no act of bankruptcy committed by the respondent.

3 No other interested person appearing, the matter came on to be heard on the pleadings, and the District Court, being of opinion that the petition alleged an act of bankruptcy not denied by the answer tendered, overruled the demurrer, refused to permit the answer to be filed, and made the usual order of adjudication in bankruptcy. From this order the First National Bank of Fremont and the Citizens Banking Company appealed to the Circuit Court of Appeals.

Upon the facts above set forth, the questions of law concerning which this Court desires the instructions of the Supreme Court are as follows:

1. Whether the failure by an insolvent judgment debtor, and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a "final disposition of the property" affected by such levy, under the provisions of Sec. 3*a* (3) of the Bankruptcy Act of 1898.

2. Whether an insolvent debtor commits an act of bankruptcy rendering him subject to involuntary adjudication as a bankrupt, under the Bankruptcy Act of 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate.

In accordance with the provisions of Sec. 239 of the Judicial Code, the foregoing questions of law are, by the Circuit Court of Appeals of the United States, Sixth Circuit, hereby certified to the Supreme Court.

J. W. WARRINGTON,
Circuit Judge;
LOYAL E. KNAPPEN,
Circuit Judge;
ARTHUR C. DENISON,
Judges of the Circuit Court of Appeals,
Sitting in this Cause.

[Endorsed:] No. 2193. United States Circuit Court of Appeals, Sixth Circuit. Citizens' Banking Company, Appellant, vs. Ravenna National Bank of Ravenna, Ohio, and Cora M. Curtis, Appellees. Certificate to the Supreme Court. Filed Jun- 4, 1912. Frank O. Loveland, Clerk. Recorded—Journal D—295, 296.

4 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Citizens Banking Company, Appellant vs. Ravenna National Bank, et al., Appellees, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 7th day of June A. D. 1912.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] United States Circuit Court of Appeals for the Sixth Circuit. Citizens' Banking Company, Appellant, vs. Ravenna National Bank of Ravenna, Ohio, and Cora M. Curtis, Appellees. Questions Certified to the Supreme Court of the United States.

Endorsed on cover: File No. 23,269. U. S. Circuit Court Appeals, 6th Circuit. Term No. 288. Citizens' Banking Company vs. Ravenna National Bank of Ravenna, Ohio, and Cora M. Curtis. (Certificate.) Filed June 28, 1912. File No. 23,269.

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IN THE

Supreme Court of the United States

October Term, 1913. No. 288.

CITIZENS BANKING COMPANY,

vs.

RAVENNA NATIONAL BANK OF RAVENNA, OHIO, AND CORA M. CURTIS.

BRIEF AND ARGUMENT ON BEHALF OF CITIZENS BANKING COMPANY.

G. RAY CRAIG,
EDWARD H. RHOADES, JR. AND
JOHN D. RHOADES,
Attorneys for Citizens Banking Company.

THE TOLEDO BRIEF & RECORD COMPANY,
PRINTERS.

IN THE

Supreme Court of the United States

October Term, 1913. No. 288.

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RAVENNA NATIONAL BANK OF RAVENNA, OHIO, AND CORA M. CURTIS.

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JOHN D. RHOADES,
Attorneys for Citizens Banking Company.

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TABLE OF CASES.

IN THE

Supreme Court of the United States

October Term, 1913. No. 288.

CITIZENS BANKING COMPANY,

vs.

RAVENNA NATIONAL BANK OF RAVENNA, OHIO, AND CORA M. CURTIS.

BRIEF AND AGUMENT ON BEHALF OF CITIZENS BANKING COMPANY.

STATEMENT OF CASE.

This case is in this court upon a certificate from the United States Circuit Court of Appeals for the sixth circuit.

August 10th, 1908, The Ravenna National Bank filed in the United States District Court for the Northern District of Ohio its petition in bankruptcy against Cora M. Curtis.

The petition included every allegation necessary to require an adjudication of bankruptcy, unless upon the point whether the defendant had committed an act of bankruptcy; and upon this subject its sole allegation was as follows:

"That the said Cora M. Curtiss is insolvent, and that within four months next preceding the date of this petition, she committed the following acts of bankruptcy, towit:

(*a*) On April 9, 1908, the respondent suffered and permitted the Citizens' Bank of Norwalk, Ohio, to recover a judgment against her for $1,598.78 and costs, by the consideration of the Common Pleas Court of Erie County, Ohio; that on April 9, 1908, execution was issued and levied on the real estate owned by respondent, in Norwalk, Ohio; that subsequently, said execution was levied on the real estate of respondent in Toledo, Ohio.

(*b*) That on or subsequent to April 9, 1908, the respondent suffered and permitted the First National Bank of Fremont, Ohio, to recover a judgment against her for $3,034.66 and costs, by the consideration of the same court; that on April 11, 1908, an execution was issued thereon and levied on the real property of respondent which was situated in Norwalk, Ohio; that shortly thereafter an execution on said judgment was levied on the real property of respondent which is situated in Toledo, Ohio.

(*c*) That the said respondent suffered the Huron Banking Company, of Norwalk, Ohio, to recover a judgment against her for $3,678.12, and costs, by the consideration of the same court, said judgment having been rendered subsequent to April 9, 1908; that on April 16, 1908, an execution on said judgment was duly issued and levied on the real estate of respondent.

That by the acts of bankruptcy aforesaid, the respondent suffered and permitted the three judgment creditors above mentioned to obtain preferences; that respondent has not, at any time, vacated or discharged said preferences or any part thereof."

(Transcript, page 1.)

Two of the judgment creditors, the First National Bank of Fremont, and the Citizens Banking Company, opposed the granting of the petition, the one by demurrer—the other by tendering for filing its answer, averring that the petition disclosed no act of bankruptcy committed by the respondent. (Transcript, page 2.)

The questions of law concerning which, the instructions of this court are asked, are as follows (Transcript, page 2):

> "1. Whether the failure by an insolvent judgment debtor, and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a "final disposition of the property" affected by such levy, under the provisions of Sec. 3a (3) of the Bankruptcy Act of 1898.
>
> 2. Whether an insolvent debtor commits an act of bankruptcy rendering him subject to involuntary adjudication as a bankrupt, under the Bankruptcy Act of 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate."

That part of Section 3a (3) of the Bankruptcy Act of 1898, which is pertinent to the questions certified, is as follows:

> "Acts of bankruptcy by a person shall consist of his having * * * (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

ARGUMENT.

I.

The failure by an insolvent judgment debtor for a period of one day less than four months after the levy of an execution upon his real estate to vacate or discharge such levy is not a "final disposition of the property" affected by such levy, within the provisions of the above section of the Bankruptcy Act.

The Bankruptcy Act contains no definition of the term "final disposition" or the words "final" or "disposition." They have, however, a fixed legal signification.

The word "final" is defined in Bouvier's Law Dictionary (Ed. 1897) as follows:

"last; conclusive; pertaining to the end. In law it is usually employed in contrast with interlocutory, in respect to the pendency of suits."

The Standard Dictionary defines "final" as follows:

"of, pertaining to or coming at, or as the end or conclusion; ultimate; last."

The word "dispose" means to alienate, to divest the ownership of. It includes barter, exchange or partition.

Anderson's Dictionary of Law, p. 365.

This same word "dispose" means to effectually transfer: to exchange for other property; to get rid of; to give; to part with; to part with the right to, or ownership of, property, in other words, a change of property; to relinquish; to sell; to sell at auction; to sell for cash or on time; to transfer to any person or to put into the hands of another. The term imports finality.

14 Cyc., pp. 516, 517.

The phrase "final disposition" has been judicially determined in several cases, as follows:

"The phrase 'final disposition of the case,' in 19 Stat., 102, allowing an application for discharge in bankruptcy, where there are no assets, 'at any time after the expiration of 60 days, and before the final disposition of the cause,' means the settlement of the estate and the discharge of the assignee or trustee."

In re Heller (U. S.), 9 Fed., 373.

"It means the final disposition of the administration of the estate."

In re Brightman (U. S.), 4 Fed. Cas., 136, 137.

"The final disposition of a matter submitted to arbitration is a determination so that nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation is required or can arise on the matter. It is such an award that the party against whom it is made can perform

or pay it without any further ascertainment of rights or duties."

Colcord vs. Fletcher, 50 Me., 398, 401.

"The expression 'final disposition,' as used in Act June 25, 1868, 2, allowing the court of claims at any time while any suit or claim is pending before or on appeal from the said court, or within two years next after the final disposition of any such suit or claim, on motion on behalf of the United States to grant a new trial in any such suit or claim means the final determination of the suit on appeal, if an appeal is taken, or, if none is taken, then its final determination in the court of claims."

Ex parte Russell, 80 U. S. (13 Wall.), 664, 667, 20 L. Ed., 632.

The last three authorities are cited in Vol. 3 "Words & Phrases Judicially Defined."

Bearing in mind the signification of these words, what does the term "final disposition" mean as it is found in Section 3a (3) of the Bankruptcy Act?

The "final disposition" of the property referred to in Sec. 3a (3) of the Bankruptcy Act evidently means a final disposition of the property arising out of and resulting from the *legal proceedings*.

By a sale of property under legal proceedings the title to the property is forever taken from the former owner; likewise the possession, enjoyment and control of the property is forever lost to him. He no longer has any interest in the property or right to the use thereof, and it was manifestly the object of the Bankruptcy Act to provide that this act of bankruptcy should not be complete by merely allowing a creditor to obtain a preference, but should only be complete when the property upon which the creditor obtained the preference was about to be (within five days) forever taken from the debtor by "sale" or "final disposition," with the result that the debtor would thereafter be powerless to dis-

charge the preference because the property had forever passed from his possession and control.

The words "final disposition" used in connection with the word "sale" evidently are intended to cover every alienation of the property of the debtor through legal proceedings, which would take the property from the debtor as completely and as finally as would a sale. For instance, we suggest that an action in replevin by which a debtor's property might be forever taken from him and he be forever barred of the title, use, enjoyment and control thereof would be such a "final disposition." Likewise, a final disposition of real property might be effected through legal proceedings by an action in ejectment, or, in certain cases, by an action to quiet title.

In all these cases, sale, action in replevin, ejectment or to quiet title, the result of the sale or the final disposition, under these actions, would be to take forever from the debtor the property itself, his title thereto, as well as his control thereof, and his right to use the same, and *forever place it beyond his power to discharge the preference thereon.*

Judgment liens upon real estate have none of these elements of finality. The title to the property affected remains, as before, in the judgment debtor. The right to the use, occupancy and control of the property remains in him. The right to lease, bargain, sell or mortgage the property, also, remains in him. The rents, issues and profits belong to the judgment debtor; the increment in value is his.

The property is his property, and he may, at any time, discharge the lien which the creditor has acquired thereon.

Furthermore, as pointed out by the Per Curiam opinion of the Circuit Court of Appeals in this present case, 202 Fed., 892:

> "The continued existence of the lien is uncertain as against the debtor, for the judgment may be set aside upon motion for a new trial or by a reviewing court. So, too, the section covers attachment liens as well as execution liens (*Metcalf vs. Barker,* 187 U. S., 165), and attachment liens are often, if not usually, subject

for a much longer period than four months, to defeasance by the ordinary incidents of procedure, as by a motion to dissolve, or by a failure by the plaintiff to recover judgment."

This is well illustrated by an examination of the Ohio statutes providing for the review and vacation of judgments. At the time the bankruptcy proceedings now before the court were instituted a judgment debtor in Ohio had four months from the date of the judgment within which to begin proceedings in error in the next higher court.

> "No proceedings to reverse, vacate or modify a judgment or final order shall be commenced unless within four months after the entry of the judgment or final order complained of; or in case the person entitled to such proceedings is an infant, a person of unsound mind, or imprisoned, within four months exclusive of the time of such disability."
>
> General Code of Ohio, Sec. 12270, R. S. 6723.

It is further provided by Section 12265 of the General Code of Ohio, that

> "No proceeding to reverse, vacate, or modify a judgment or final order rendered in the probate, common pleas or circuit court, except as hereinafter provided, shall stay execution, unless the clerk of the court in which the record of such judgment or final order is made takes a bond executed on the part of the plaintiff in error to the adverse party, with sufficient surety as follows:"
>
> (Here follows a description of the bonds required in various classes of cases.)

It is provided by Section 11702 of the General Code:

> "If a judgment, in satisfaction of which lands or tenements are sold, be thereafter reversed, such reversal shall not defeat or affect the title of the purchaser. In such case restitution must be made by the judgment creditor, of the money for which such lands or tenements were sold, with lawful interest from the day of sale."

It will thus be seen that in the case of an actual sale there is a real "final disposition" of the property notwithstanding the judgment may be erroneous and subsequently reversed. Not so, however, if there has been no sale. In such event the lien of the judgment disappears with the reversal of the judgment and the property is right back where it was before the judgment was rendered and in fact where it had been continuously. In such circumstances to say that there had been a final disposition of the property because of the fact that the invalid judgment was not discovered to be invalid prior to four months less five days, would be we submit a most extraordinary abuse of the English language.

A similar and perhaps even more anomalous situation arises by reason of certain statutes which we believe are peculiar to Ohio. In this state there is a right to take an appeal from the court of common pleas to the circuit court (now called the court of appeals) in certain classes of cases, and upon an appeal being taken the case is tried *de novo* in the circuit court which in such cases becomes a trial court.

Section 12223 of the general code of Ohio provides:

> "The circuit court shall have jurisdiction of certain cases, as hereinafter provided, by appeal; and the trial therein shall be conducted in the same manner as in the common pleas court, and upon the same pleadings, unless amendments are permitted or ordered by the circuit court."

Section 12224 of the general code of Ohio provides:

> "In addition to the cases and matters specifically provided for, an appeal may be taken to the circuit court by a party or other person directly affected, from a judgment or final order in a civil action rendered by the common pleas court, and of which it had original jurisdiction, if the right to demand a jury therein did not exist, and from an interlocutory order made by the common pleas court, or a judge thereof, dissolving an injunction in a case of which it had original jurisdiction."

The effect of such appeal, however, is not to destroy the lien of the judgment rendered by the court of common pleas.

Section 12237 of the general code of Ohio provides:

> "When a party against whom a judgment is rendered appeals his cause to the circuit court, the lien of the opposite party on the real estate of the appellant, created by the judgment, shall not be removed or vacated; but it shall be bound, in the same manner as if the appeal had not been taken, until the final determination of the cause in the circuit court."

It has, however, been held repeatedly by the supreme court of Ohio that the effect of the law is to suspend the execution of the judgment of the lower court until the appeal is disposed of by the circuit court.

See Jenney vs. Walker, 80 O. S., 100.

An appeal is ordinarily perfected by giving a bond within thirty days after the judgment or order is entered on the journal of the court. Section 12226, General Code of Ohio.

Where we have an appealable case in which an appeal is taken we may therefore have this situation. The judgment of the court of common pleas is a lien on the real estate and remains so notwithstanding the appeal but no sale can be had until the appeal is passed upon. More than four months may and usually does elapse between the entry of the judgment in the court of common pleas and the decision of the case upon appeal. If the theory as to the meaning of "final disposition" which we are combatting is upheld then notwithstanding an appeal may have been taken the property will be deemed to have been finally disposed of at the beginning of the five day period preceding the end of four months after the judgment and a petition in bankruptcy may be filed based upon such "final disposition" of the property as an act of bankruptcy, and the judgment debtor may be forced through bankruptcy, although the day after or the week after or a

month or six months after the bankruptcy petition is filed he may win his appeal, destroy the lien of the judgment of the lower court upon his real estate and again be entitled to the enjoyment of such real estate free from all claim of the former judgment creditor. We thus have what might be called a *temporary* "final disposition" of the property, or in other words, a "final disposition" which is not final and in fact is not a disposition.

Further along this same line, there are in Ohio as in most of the other states statutes which give persons against whom judgments are entered the right to relief from such judgment by appropriate proceedings even years after the judgment has been entered. Such is Section 11631 of the General Code of Ohio which provides among other things that judgments may be vacated after the term,

> "3. For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order;
> "4. For fraud practiced by the successful party in obtaining a judgment or order;
> "5. For erroneous proceedings against an infant, or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;
> "6. For the death of one of the parties before the judgment in the action;
> "7. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending;
> "8. For errors in a judgment, shown by an infant within twelve months after arriving at full age as prescribed in section eleven thousand six hundred and three;"

And under other circumstances prescribed in that and other sections of the statutes.

By availing himself of the opportunity given by such statutes as these a judgment debtor may obtain the vacation of a judgment and the setting aside of its lien years after four months from the date of the judgment. We submit that this demonstrates that the so-called "final disposition" of the

property five days before the lapse of such four months, is not a disposition of the property in any sense at all.

Furthermore it is provided by the General Code of the State of Ohio:

> "SEC. 11663. If execution on a judgment rendered in a court of record in this state, or a transcript of which has been filed as hereinbefore provided, be not sued out within five years from the date of the judgment, or if five years intervene between the date of the last execution issued thereon and the time of suing out another execution, such judgment shall be dormant, and cease to operate as a lien on the estate of the judgment debtor. (R. S., Sec. 5380.)"
>
> "SEC. 11708. No judgment on which execution is not issued and levied before the expiration of one year next after its rendition, shall operate as a lien on the estate of a debtor to the prejudice of any other *bona fide* judgment creditor. (R. S., Sec. 5415.)"

It is manifest from these provisions of the statutes that further affirmative action is required on the part of the judgment creditor not only to preserve the priority of the lien of his judgment upon the property of the debtor, but even to preserve the lien itself.

How can the mere obtaining of a judgment lien be considered a "final disposition" of the debtor's property as a result of legal proceedings, when the lien itself is subject to be divested upon a reversal of the judgment—when the lien itself is a mere temporary thing requiring further affirmative action on the part of the creditor to realize thereon, or even to keep it alive—when the title of the property remains in the judgment debtor and the right to the use, enjoyment and control thereof remains in the judgment debtor, and the right remains in him at any time to discharge the judgment lien?

The rendition of the judgments, the issue and levy of the executions, did not, in any legal sense, effect a "final disposition" of the property referred to in the petition.

The fact, that the adjective "final" is used, only makes it more apparent that it was the intention of the Congress that the phrase "final disposition" means such a disposition as takes with it an actual and complete transfer of the title to the property of which "final disposition" is made. In other words, it is just what the word "final" imports—a complete disposition of the property, so that the former owner thereof has no further dominion over it or rights to it.

Therefore, we respectfully submit that to *dispose* of property means to exercise finally one's power of control over it; to pass it over into the control of another; to part with it; and finally to get rid of it. And that the words "final disposition" as used by the Congress mean a disposition which is no less final than an actual sale of the property, and that the mere continued existence of a judgment lien upon real estate for a period of four months is no such "final disposition."

II.

An insolvent debtor does not commit an act of bankruptcy merely by inaction for a period of four months after the levy of an execution upon his real estate.

Two things are necessary in order to commit an act of bankruptcy under the subdivision under consideration.

1. The suffering or permitting of the preference through legal proceedings.

2. The failure to discharge such preference at least five days before a sale or final disposition of any property affected thereby.

No person can be adjudged a bankrupt for any act except those specifically enumerated in the bankruptcy statute. This has always been the rule under this act as well as the former acts of bankruptcy. This was clearly and positively pointed out by this court in *Wilson vs. City Bank of St. Paul.*

17 Wall. (U. S.), 473, wherein this court expressly refuses to enlarge the acts of bankruptcy enumerated in the statute (pp. 485-486).

> "The argument we are combatting goes upon the hypothesis that there is another class given to the creditor by inference, namely, where the debtor ought himself to go into court as a bankrupt and fails to do it. We do not see the soundness of this implication from anything in the statute.
>
> We do not construe the act as intended to cover *all* cases of insolvency, to the exclusion of other judicial proceedings. It is very liberal in the classes of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves, in a great majorty of cases, parties who are really insolvent, to the chances that their energy, care, and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy.
>
> Many find themselves with ample means, good credit, large business, technically insolvent; that is, unable to meet their current obligations as fast as they mature. But by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally able to pay all, and to save their commercial character and much of their property. If creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings in a bankrupt court. But until this is done, their honest struggle to meet their debts and to avoid the breaking up of all their business is not, of itself, to be construed into an act of bankruptcy, or a fraud upon the act."

It is true as pointed out by this court in *Wilson vs. Nelson*, 183 U. S., 191, that the bankruptcy law of 1898 differs from that of 1867 in that the intent of the debtor is not now an essential fact in establishing this ground of bankruptcy, but as pointed out by the able opinion of Judge Rose *in re Truitt*, 203 Fed., 550-557, "Nothing which was said in the case of *Wilson Bros. vs. Nelson* in any way modifies the general rule of construction laid down in *Wilson vs. City Bank*

to the effect that, a proceeding in involuntary bankruptcy being against common right, all substantial doubts must be resolved in favor of the debtor."

So it is held *in re Empire Metallic Bedstead Company* decided by the Circuit Court of Appeals, Second Circuit:

> "A petition for the appointment of a receiver is not that proceeding which is universally recognized as an assignment, and its 'equivalency' of result, if equivalency exists, is not important."

The court go on to say:

> "The bankruptcy statute has said that the one is an act of bankruptcy, and has said nothing about the other, in direct terms; and when acts of bankruptcy are classified, as they are in the statute of 1898, it is not the province of a court to enlarge the classification because the omitted class seems to partake of the sin of the named class. Why the Legislature did not specifically mention acts of corporations which would have the effect of a general assignment, but which are of a different character, it is unnecessary to surmise; for it is, in our opinion, sufficient to say that these other acts are not assignments, and were not particularly specified, and that, if they are acts of bankruptcy, it is because they are included in the general language of one of the other subdivisions of Section 3 of the act."
>
> In re Empire Metallic Bedstead Co., 98 Fed. Rep., 981. (See p. 982.)

> "The act of bankruptcy is not consummated until the expiration of the time in which the debtor may vacate or discharge the lien and the last day for doing this is five days before the day a sale of the property is advertised. In the case of a judgment, therefore, the petitioners must prove the entry of the judgment, the issue of an execution, the levy thereunder and the debtor's insolvency at the time of the judgment and levy. They must also prove that the property was actually sold at execution sale or that the sale was advertised for a day certain and that the debtor had permitted the levy to stand until the sale was but five days distant."

In re Rome Planing Mill, 96 Fed. Rep., 813. (See p. 815.)

"A debtor who does not pay a lawful debt when due, upon which the creditor obtains a judgment against him and levies on his property, 'suffers or permits' the creditor to obtain a preference, through legal proceedings, within the meaning of bankruptcy act July 1st, 1898, * * * * which, if he is insolvent, and unless he discharges the preference at least five days before the time for sale under the levy, constitutes an act of bankruptcy."

Bogen & Trummel vs. Protter, 129 Fed. Rep., 533.

The case last cited was decided on May 4, 1904.

Judgments were rendered against the bankrupt in October, and executions were issued thereon, and the judgment debtor's property was advertised to be sold on October 25th and October 27th. On October 24th the petition in involuntary bankruptcy was filed against him. It will be noted that this court held that, there being a sale of the judgment debtor's property actually advertised, the act of bankruptcy was thereby committed by him.

In the case at bar, there is no allegation or claim made in the petition that the sale of the bankrupt's property was advertised, or that any proceeding had been taken with reference to a sale thereof after the issuing and levying of the executions.

"Where an involuntary bankruptcy petition alleged that judgment had been obtained and executions levied against the bankrupt's property, but failed to state the further history of the executions, it did not state an act of bankruptcy, since it is only the debtor's failure within five days before a sale of his property levied on to have the execution vacated or discharged, and not the rendition of a judgment and the levying of execution, that constitutes an act of bankruptcy."

In re Vastebinder (District Court of Pa.), 126 Fed. Rep., 417.

In re Vastebinder, supra, Archbald, District Judge, made the following observation:

> "It is not the mere obtaining of a judgment and levying execution on the property of the debtor while insolvent that makes him liable as a bankrupt, but the failure on his part, within five days before a sale or final disposition of the property levied on, to have the same vacated or discharged; and there is nothing of that kind alleged here. All that is stated is that judgments were obtained and executions levied, but what became of them is not shown. The vital point in the charge is thus left out, and as to this the demurrer is well taken."

(See page 420.)

In a case decided by the United States District Court of Connecticut, entitled *In re Windt,* 177 Fed. Rep., 584, on June 6, 1909, certain personal property was attached. On October 16, 1909, a petition in bankruptcy was filed, alleging that the debtor had given a preference "by permitting the judgment and not removing it before it had rested long enough to have become perfected into a lien which would be valid as against the trustee after adjudication."

In deciding the last cited case, Platt, District Judge, said:

> "In the first place, I am not satisfied that is appears by the petition that any 'sale or final disposition' of the property attached had been arranged for at the time the petition was brought. The preference, therefore, had not gotten into such a situation that it was the duty of Windt, under the subdivision invoked, to vacate or discharge it, and of course he could not commit the act of bankruptcy until such a situation actually existed. Indeed, the petitioners admit that there was not to be any sale, and as to 'final disposition' there was not such a state of things as, in my opinion, the Congress intended to cover by the language of said subdivision."

(See page 586.)

A consummation of the act of bankruptcy under section 3 of the Bankruptcy Act of 1898 is not the date of an actual sale of the bankrupt's property under an execution, but the act of bankruptcy is completed five days before the day of such sale, if at that time the bankrupt fails to dissolve the levy.

In re National Hotel & Cafe Co. (District Court of Eastern District of Pa.), 138 Fed. Rep., 947.

A petition in bankruptcy which alleges, among other things, that an attachment has been made in a legal proceeding and levied on the debtor's property, without any allegation as to the disposition thereof, is insufficient.

In re Vetterman (District Court of New Hampshire), 135 Fed. Rep., 443.

In re Seaboard Steel Casting Co. (D. C.), 124 Fed. Rep., 75. (See p. 76.)

When a respondent's conduct is considerably analogous to some of the statutory acts of bankruptcy, but is not fairly covered by any statutory definition, such a respondent will not be adjudged a bankrupt.

In re Baker-Ricketson Co. (District Court of Mass.), 97 Fed. Rep., 489. (See page 493.)

In re Truitt, 203 Fed., 550. In this action Judge Rose of the District Court of Maryland most carefully considers and weighs the arguments on each side of this question and reaches the conclusion (557):

"The courts may not change what Congress did on the theory that the general purpose of Congress will be more nearly carried out by construing the act to mean something which Congress was unwilling to say. Under the act of 1867 the courts were asked to put a rather strained interpretation upon some of its lan-

guage in order to carry out the supposed intent of Congress to secure equality of distribution in all cases of insolvency. The Supreme Court did not see its way clear to comply with this request. (*Wilson vs. City Bank, supra.*) In that case the court declared that, before any one may be adjudicated an involuntary bankrupt, the precise circumstances or facts in which this is authorized to be done should not only be well defined in the law but clearly established in the court. This general rule of law Congress may well be supposed to have had in mind when it passed the present act. It had a right to assume that the courts would not by construction hold things to be acts of bankruptcy which it had not been willing clearly to declare to be such."

Moreover not only would the answering of the second question propounded by the certificate in the affirmative be an enlargement by the courts of the acts of bankruptcy unwarranted by the act itself, but the new act of bankruptcy thus created by the court would, as we submit, be wholly subversive of a just interpretation of the act. Debtors have some rights as well as creditors.

The contention that the failure of an insolvent judgment debtor, for the period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a "final disposition" of the property affected by such levy, under the provisions of Sec. 3a (3) of the Bankruptcy Act of 1898, we respectfully submit, does violence to the cardinal rules of statutory construction, and is an attempt to give such section a strained construction to meet a contingency neither provided for in the act, nor in the contemplation of Congress when it passed such act.

Where Congress makes a plain provision, without making any exception, the courts can make none.

French vs. Spencer, 21 How., 228.

Yturbide vs. United States, 22 How., 290.

Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such case there is no necessity for construction.

Thornley vs. United States, 113 U. S., 310.
Poor vs. Considine, 6 Wall., 458.

It is needless to remind the court that there are numerous judgments obtained every year which become liens upon real estate where the judgment debtor is solvent. Yet if he failed to discharge these judgments within four months, he is, under this construction of the act, liable to have a petition in bankruptcy filed against him and be compelled to appear in the Federal District Court and bring his books and papers to establish his solvency.

There are numerous solvent business men whose credit would be destroyed and who would be practically ruined by the mere filing against them of a petition in bankruptcy. Is it reasonable to suppose that the Congress had in mind that the bankruptcy law could and would be thus used, and is a construction of the law a reasonable one which would permit such an abuse?

Is that construction of the Bankruptcy Act to be adopted which will in effect say to every judgment debtor whose real estate is bound by the lien of the judgment that if he takes his case to an Appellate Court it will be probably more than four months before it will be decided and he must run the risk of having a petition in bankruptcy filed against him?

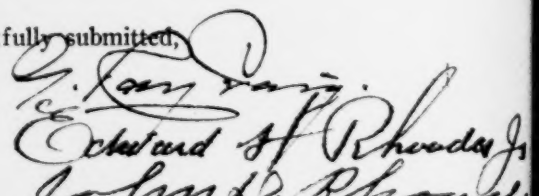
Furthermore, how is an insolvent debtor whose real estate is subject to a judgment lien to vacate or discharge this lien? Should he pay the judgment he would commit an act of bankruptcy. Is he then compelled to file a voluntary petition in bankruptcy? Is the only way to avoid one act of bankruptcy to commit another one? This anomalous situation is well set forth in the *per curiam* in the Circuit Court of Appeals in this case, 202 Fed., 892.

> "If * * an execution is issued and levied on the property of an insolvent person and the indebtedness is admitted or established, there is, outside of the bankruptcy law, no possible way for the debtor to 'vacate or discharge the levy, except by payment, and he is, although hopeful for the future, wholly unable at present to pay, and he can not in any way vacate the levy, except by filing a voluntary petition in bankruptcy. In other words, only by filing the voluntary petition and committing an act of bankruptcy can he avoid becoming subject to adjudication as a bankrupt under this section; or, in still other words, the only way to avoid committing an act of bankruptcy is to commit one."

We are unable to convince ourselves that Congress ever intended to enact, or did enact, any act so grossly unjust to the debtor class, and we submit that the courts will not thus enlarge by implication on the acts of bankruptcy set forth in the act.

We therefore respectfully submit that this court should answer in the negative each of the questions of law certified to it in this case.

Respectfully submitted,



Attorneys for Citizens Banking Company.

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In the Supreme Court of the United States

October Term, 1913. No. 288.

CITIZENS BANKING COMPANY,
Appellant,

vs.

RAVENNA NATIONAL BANK OF RAVENNA, OHIO,
and CORA M. CURTISS,
Appellees.

BRIEF AND ARGUMENT FOR APPELLEES, RAVENNA NATIONAL BANK and CORA M. CURTISS.

By
A. T. BREWER,
Of Clevland, Ohio, Their Attorney.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO.

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STATEMENT.

As shown on pages 1 and 2 of brief for appellant, judgment was obtained and levy made on the bankrupt's property on April 9, 1908. The Petition in Bankruptcy was filed August 10, 1908. The day before that, August 9th, the last day of the four months, was Sunday, and therefore, excluded. Hence, the petition was filed within four months from the act of bankruptcy.

Sec. 31, Bankruptcy Act of 1898, Ohio Statutes, Secs. 10216-7.

As further shown and admitted on pages 1 and 2 of said brief, the petition against the bankrupt was sufficient on all points not arising under the two questions certified. There is, in this Court, therefore, but

One Proposition Involved.

The two questions submitted by the Circuit Court of Appeals under the facts really cover one proposition which we state affirmatively as follows:

The failure by an insolvent judgment debtor for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a "final disposition of the property," affected by the levy, under the provisions of section 3a (3) of the Bankruptcy Act of 1898, making the debtor subject to involuntary adjudication as a bankrupt under said section 3a (3), and it is not essential that the debtor shall do anything at all.

It is assumed in this statement that the judgment debtor, being insolvent, the levy constitutes a lien and works a preference. The circuit statement as copied in appellant's brief justifies this assumption.

Authorities.

In support of the proposition above stated, the following authorities, exactly in point, are cited.

> Wilson vs. Nelson, 183 U. S., 191. Certificate from the Circuit Court of Appeals for the Seventh Circuit. No. 31. Submitted April 22, 1901. Decided December 9, 1901.

When a debtor, years before the filing of a petition in bankruptcy, gives to a creditor an irrevocable power of attorney to confess judgment after maturity upon a promissory note of the debtor; and the creditor, within four months before the filing of the petition in bankruptcy against the debtor, obtains such a judgment and execution thereon; and the debtor fails, at least five days before a sale on the execution, to vacate or discharge the

judgment, or to file a voluntary petition in bankruptcy; the judgment and execution are a preference "suffered or permitted" by the debtor, within the meaning of the bankruptcy act of July 1, 1898, c. 541, 3 cl. 3, and the debtor's failure to vacate or discharge the preference so obtained is an act of bankruptcy under that act.

On page 198, Mr. Justice Gray, in the opinion, says:

> "In the case at bar, the warrant of attorney to confess judgment was indeed given by the debtor nearly thirteen years before. But being irrevocable and continuing in force, the debtor thereby, without any further act of his, 'suffered or permitted' a judgment to be entered against him, within four months before the filing of the petition in bankruptcy, the effect of the enforcement of which judgment would be to enable the creditor to whom it was given to obtain a greater percentage of his debt than the other creditors; and the lien obtained by which, in a proceeding begun within four months, would be dissolved by the adjudication in bankruptcy, because 'its existence and enforcement will work a preference.' And the debtor did not, within five days before the sale of the property on execution, vacate or discharge such preference, or file a petition in bankruptcy. By failing to do so, he confessed that he was hopelessly insolvent, and consented to the preference that he failed to vacate."

Bogen & Trummel v. Protter.

Circuit Court of Appeals, Sixth Circuit. May 4, 1904.

No. 1,266.

I. Bankruptcy—Acts of Bankruptcy—Suffering Preference Through Legal Proceedings.

A debtor who does not pay a lawful debt when due, upon which a creditor obtains a judgment against him and levies on his property "suffers and permits" the creditor to obtain a preference, through legal proceedings

within the meaning of Bankr. Act July 1, 1898, c. 541, §3, subd. 3, cl. "a", 30 Stat. 546, 547 (U. S. Comp. St. 1901, p. 3422), which, if he is insolvent, and unless he discharges the preference at least five days before the time for the sale under the levy, constitutes an act of bankruptcy.

129 Federal, 533.

Folger v. Putnam, 194 Federal 793 (28 A. B. R. 173).

In re Folger.

U. S. Circuit Court of Appeals for the Ninth Circuit, March, 1912. Act of Bankruptcy—Preference through Legal Proceedings—What Constitutes.

A preference may consist not only in bankrupt's procuring or suffering a judgment to be entered against him or making a transfer of his property within four months of the filing of the petition in bankruptcy, but also in the creation of a lien by way of attachment, or the confession of a judgment within four months of the filing of the petition, the existence and enforcement of which will work a preference.

Same: Failure to Vacate Attachment Lien.

Although the mere suffering or permitting, while insolvent, a creditor to obtain a preference, alone does not constitute an act of bankruptcy under section 3a (3) of the Bankruptcy Act, but the debtor must have failed at least five days before a sale or final disposition of the property to have vacated or discharged such preference, it is incumbent upon an insolvent person to discharge or vacate a lien, secured by an attachment upon his property, at least 5 days before a period of four months expires following the date of the levy of such attachment, and if he fails to do so he commits an act of bankruptcy.

Wolverton, District Judge:

In the opinion, page 181, says that final disposition within the operation of the law is effected when the lien becomes irrevocable unalterably incumbering the property of the bankrupt.

He further says:

> "We hold, therefore, that it is incumbent upon an insolvent person to discharge or vacate a lien secured by an attachment upon his property at least five days before a period of four months expires following the date of the levy of such attachment, and if he fails therein he commits the third act of bankruptcy. It may be and has been suggested that this will sometimes force a person into bankruptcy, when the attachment is acquired upon an invalid or spurious claim, or one not provable against the bankrupt's estate; but it seems to us better that this contingency should obtain than that the very statute itself should be defeated in its fundamental purpose. Of course, unless the person against whom the attachment is secured is insolvent, the conclusion reached cannot apply."
>
> 194 Federal, 793.

The case, In Re Tupper, decided July 17th, 1908, in the District Court, for the Northern District of New York, 163 Fed., 766, is exactly like the case at bar in the essential facts. The 4th and 5th Syllabi of this case are in the following language:

> "4. 'Preference – Transfer.'
>
> Bankr. Act, July 1, 1898, c. 541, Sec. 60, 30, Stat. 562 (U. S. Comp. St. 1901, p. 3445), declares that a person shall be deemed to have given a 'preference,' if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before adjudication, procured or suffered a judgment to be entered against himself in favor of any person or made a transfer of any of his property, the effect of which will be to enable one

creditor to obtain a greater percentage of his debt than other creditors of the same class. Section 1, subd. 25, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), declares that a 'transfer' shall include the sale and every other and different mode of disposing of or parting with property or the possession of property absolutely or conditionally as a payment, pledge, mortgage, gift, or security. Section 3, subd. 3, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), provides that a person shall commit an act of bankruptcy if he has suffered or permitted any creditor to obtain a preference through legal proceedings and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged the same. Held, that where a debtor, while insolvent, permitted certain creditors to recover and docket a judgment against her in the county, in which she had an equity in real estate, and such judgment was permitted to remain a lien until one day before the expiration of four months from the date it was so docketed, and on the expiration of such time it would have become an absolute security for the debt, it constituted a preference and an available act of bankruptcy.

5. 'Final Disposition.'

Bankr. Act, July 1, 1898, Sec. 3, subd. 3, c. 541, 30 Stat., 546 (U. S. Comp. St. 1901, p. 3422), provides that a person shall have committed an act of bankruptcy by having suffered or permitted, while insolvent, any creditor to obtain a preference by legal proceeding and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged it. Held, that the term 'final disposition,' as so used, did not mean a gift of the property to some third person or a voluntary transfer to the creditors in satisfaction of a preferential judgment, but included every other method than that specified of passing the control and dominion of the property of the insolvent debtor to another or others either absolutely or as security to the preferred creditor to the exclusion of his other creditors."

Ray, District Judge, in the opinion at page 770, uses this language:

> "It seems to me that effect is to be given to the words 'or final disposition of any property affected by such preference.' 'Final disposition' is not a gift of the property to some third person or a voluntary transfer to the creditor in satisfaction of the preferential judgment, as that would be merely a sale in payment. Congress had in mind, when it enacted this law, the fact that there are different ways or modes of disposing of property, of enforcing executions, judgments, and liens, and it referred to the ordinary method of disposition by way of sale, and then used the words 'or final disposition' to cover every other method of passing the control and dominion of the property from the debtor, insolvent person, to another or to others either absolutely or as security to the preferred creditor to the exclusion of his other creditors. The purpose of the law is that no one creditor shall be preferred over the others by an insolvent person, but that all creditors shall share equally except as to honest liens created more than four months prior to the filing of a petition in bankruptcy. It was not intended that a creditor should obtain a lien on all the real estate of an insolvent person by a judgment filed and docketed, and then lie still, without issuing execution or making a levy and advertising the property for sale for four months and until such judgment had become unimpeachable under the bankruptcy act or otherwise, thereby gaining a preference, an absolute security for the debt, and it might be to the extent of the entire property of the insolvent person, and thus excluding other creditors from any share in the estate. It has been held that an advertised or even a proposed sale is not in all cases necessary under subdivision 3 of section 3. In re Harper (D. C.), 105 Fed., 900, 5 Am. Bankr. Rep., 567; In re Miller, et al. (D. C.), 5 Am. Bankr. Rep., 140, 104 Fed., 764; Scheuer vs. Smith & Montgomery Book, etc., Co., 7 Am. Bankr. Rep., 384, 112 Fed., 407, 50 C. C. A., 312."

Matter of McCartney, 26 Am. B. R., 548. U. S. District Court, Middle District of Pennsylvania, July, 1911. Acts of Bankruptcy—Permitting Preference Through Legal Proceedings.

Evidence given upon the hearing of a petition in involuntary bankruptcy held sufficient to sustain a finding that the alleged bankrupt was insolvent at a time when he permitted his wife and another creditor to secure judgment against him and to levy upon his property, and that he had committed an act of bankruptcy under section 3a (3) of the Bankrutpcy Act.

The bankrupt claimed he was not insolvent at the time the judgment became a lien, but in the opinion, page 550, Witmer, District Judge, says:

> "The testimony is, however, otherwise convincing that the aggregate of the property of the alleged bankrupt is at a fair valuation not sufficient in amount to pay his just debts. W. J. McCartney is unquestionably insolvent and unable to pay his lawful debts, and having stood by while his creditors secured judgment against him and levied upon his property, suffering and permitting such judgment to be taken and such levy to be made, has committed an act of bankruptcy under paragraph 3a, section 3, chapter 3 of the Bankruptcy Act of 1898 and its supplements."

CONCLUSION.

The foregoing authorities applied to the admitted facts in the case at bar clearly establish the following points:

1. That the judgment levied on the property of Cora M. Curtiss on April 9, 1908, created a lien thereon in favor of the Citizens Bank of Norwalk, the judgment creditor, the judgment debtor being then insolvent.

2. This lien existed for a period one day less than four months, to-wit, until August 10, 1908, when the petition in involuntary bankruptcy was filed by the Ravenna National Bank, being so filed within four months, as August 9th was Sunday, these facts constituting a "final dispostion" of said property by the bankrupt to the extent of the judgment.

3. To establish the bankruptcy through the foregoing facts it was not necessary for Cora M. Curtiss to do anything.

Her act of bankruptcy was therefore complete in all respects when the involuntary petition was filed and the adjudication by the District Judge was fully authorized:

I. She permitted the judgment.

II. She was then insolvent.

III. The judgment worked a preference.

IV. She did nothing to vacate it.

V. Except in bankruptcy the judgment was unassailable.

VI. The involuntary petition alone prevented the consummation of the preference and the defeat of the main purpose of the bankruptcy law in securing an equal distribution among all creditors of the property of insolvent persons.

Respectfully submitted,

A. T. BREWER,
Attorney for the Ravenna National
Bank and Cora M. Curtiss.

CITIZENS BANKING COMPANY *v.* RAVENNA NATIONAL BANK.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 288. Argued March 16, 1914.—Decided June 8, 1914.

The failure by an insolvent judgment debtor and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such a levy, is not a final disposition of the property affected by the levy under the provisions of § 3a (3) of the Bankruptcy Act of 1898.

An insolvent debtor does not commit an act of bankruptcy rendering him subject to involuntary adjudication as a bankrupt under the Bankruptcy Act of 1898 merely by inaction for the period of four months after levy of an execution upon his real estate.

All of the three elements specified in § 3a (3) of the Bankruptcy Act of 1898 must be present in order to constitute an act of bankruptcy within the meaning of that provision.

Questions certified, 202 Fed. Rep. 892, answered in the negative.

THE facts, which involve the construction of § 3a of the Bankruptcy Act of 1898, are stated in the opinion.

Mr. G. Ray Craig, with whom *Mr. Edward H. Rhoades, Jr.*, and *Mr. John D. Rhoades* were on the brief, for Citizens Banking Company:

The failure by an insolvent judgment debtor for a period of one day less than four months after the levy of an execution upon his real estate to vacate or discharge such levy is not a "final disposition of the property" affected by such levy, within the provisions of § 3a (3) of the Bankruptcy Act.

An insolvent debtor does not commit an act of bankruptcy merely by inaction for a period of four months after the levy of an execution upon his real estate.

In support of these contentions, see *Re Baker-Ricketson Co.*, 97 Fed. Rep. 489; *Bogen* v. *Protter*, 129 Fed. Rep. 533; *Re Brightman*, 4 Fed. Cas. 136; *Colcord* v. *Fletcher*, 50 Maine, 398; *Re Empire Bedstead Co.*, 98 Fed. Rep. 981; *French* v. *Spencer*, 21 How. 228; *Re Heller*, 9 Fed. Rep. 373; *Jenney* v. *Walker*, 80 Oh. St. 100; *Metcalf* v. *Barker*, 187 U. S. 165; *Re National Hotel Co.*, 138 Fed. Rep. 947; *Poor* v. *Considine*, 6 Wall. 458; *Re Rome Planing Mill*, 96 Fed. Rep. 813; *Ex parte Russell*, 13 Wall. 664; *Re Seaboard Casting Co.*, 124 Fed. Rep. 75; *Thornley* v. *United States*, 113 U. S. 310; *Re Truitt*, 203 Fed. Rep. 550; *Re Vastebinder*, 126 Fed. Rep. 417; *Re Vetterman*, 135 Fed. Rep. 443; *Wilson* v. *City Bank*, 17 Wall. 473; *Wilson* v. *Nelson*,

183 U. S. 191; *Re Windt*, 177 Fed. Rep. 584; *Yturbide* v. *United States*, 22 How. 290.

Mr. A. T. Brewer for Ravenna National Bank:

The failure by an insolvent judgment debtor for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a "final disposition of the property," affected by the levy, under the provisions of § 3a (3) of the Bankruptcy Act of 1898, making the debtor subject to involuntary adjudication as a bankrupt under said § 3a (3), and it is not essential that the debtor shall do anything at all.

It is assumed that the judgment debtor, being insolvent, the levy constitutes a lien and works a preference. *Wilson* v. *Nelson*, 183 U. S. 191; *Bogen* v. *Protter*, 129 Fed. Rep. 533; *Folger* v. *Putnam*, 194 Fed. Rep. 793; *In re Tupper*, 163 Fed. Rep. 766.

The judgment levied on the property of Curtis on April 9, 1908, created a lien thereon in favor of the Citizens Bank of Norwalk, the judgment creditor, the judgment debtor being then insolvent.

This lien existed for a period one day less than four months, to-wit, until August 10, 1908, when the petition in involuntary bankruptcy was filed by the Ravenna National Bank, being so filed within four months, as August 9th was Sunday, these facts constituting a "final disposition" of said property by the bankrupt to the extent of the judgment.

To establish the bankruptcy through the foregoing facts it was not necessary for Cora M. Curtis to do anything. Her act of bankruptcy was therefore complete in all respects when the involuntary petition was filed and the adjudication by the district judge was fully authorized.

She permitted the judgment.

She was then insolvent.

The judgment worked a preference.

She did nothing to vacate it.

Except in bankruptcy the judgment was unassailable.

The involuntary petition alone prevented the consummation of the preference and the defeat of the main purpose of the Bankruptcy Law in securing an equal distribution among all creditors of the property of insolvent persons.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

Upon a petition filed in the District Court for the Northern District of Ohio by one of her creditors, Cora M. Curtis was adjudged a bankrupt. In addition to matters not requiring notice, the petition charged that within four months next preceding its filing the respondent committed an act of bankruptcy, in that (a), while insolvent, she suffered and permitted the Citizens Banking Company to recover a judgment against her for $1,598.78 and costs, in the Common Pleas Court of Erie County, Ohio, and to have an execution issued under the judgment and levied on real estate belonging to her, whereby the company obtained a preference over her other creditors, and (b) at the time of the filing of the petition, which was one day less than four months after the levy of the execution, she had not vacated or discharged the levy and resulting preference.

The company appeared in the bankruptcy proceeding and challenged the petition on the ground that it disclosed no act of bankruptcy, but the court, deeming that such an act was charged, overruled the objection, and, there being no denial of the facts stated in the petition, adjudged the respondent a bankrupt. The company appealed to the Circuit Court of Appeals, and that court, having briefly reviewed the opposing views touching the point in controversy (202 Fed. Rep. 892), certified the case here, with a request that instruction be given on the following questions:

"(1) Whether the failure by an insolvent judgment

debtor, and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a 'final disposition of the property' affected by such levy, under the provisions of section 3a (3) of the Bankruptcy Act of 1898.

"(2) Whether an insolvent debtor commits an act of bankruptcy rendering him subject to involuntary adjudication as a bankrupt, under the Bankruptcy Act of 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate."

It will be observed that no reference is made to an accomplished or impending disposal of the property in virtue of the levy, although the mode of disposal prescribed by the local law is by advertisement and sale. 2 Bates' Ann. Ohio Statutes, §§ 5381, 5393.

The answers to the questions propounded turn upon the true construction of § 3a (3) of the Bankruptcy Act, which declares:

"Acts of bankruptcy by a person shall consist of his having . . . (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." Chapter 541, 30 Stat. 544, 546.

Looking at the terms of this provision, it is manifest that the act of bankruptcy which it defines consists of three elements. The first is the insolvency of the debtor, the second is suffering or permitting a creditor to obtain a preference through legal proceedings, that is, to acquire a lien upon property of the debtor by means of a judgment, attachment, execution or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim than other creditors of the same class, and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days

before a sale or final disposition of any property affected. Only through the combination of the three elements is the act of bankruptcy committed. Insolvency alone does not suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceedings. The third element must also be present, else there is no act of bankruptcy within the meaning of this provision. All this is freely conceded by counsel for the petitioning creditor.

The questions propounded assume the existence of the first two elements and are intended to elicit instruction respecting the proper interpretation of the clause describing the third, namely, "and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." It is to this point that counsel have addressed their arguments.

Without any doubt this clause shows that the debtor is to have until five days before an approaching or impending event within which to vacate or discharge the lien out of which the preference arises. What, then, is the event which he is required to anticipate? The statute answers, "a sale or final disposition of any property affected by such preference." As these words are part of a provision dealing with liens obtained through legal proceedings, and as the enforcement of such a lien usually consists in selling some or all of the property affected and applying the proceeds to the creditor's demand, it seems quite plain that it is to such a sale that the clause refers. And as there are instances in which the property affected does not require to be sold, as when it is money seized upon execution or attachment or reached by garnishment,[1] it seems equally

[1] See *Turner* v. *Fendall*, 1 Cranch, 117, 133; *Sheldon* v. *Root*, 16 Pick. 567; *Crane* v. *Freese*, 16 N. J. L. 305; *Green* v. *Palmer*, 15 California, 411, 418; 2 Bates' Ann. Ohio Statutes, §§ 5374, 5383, 5469, 5470, 5483, 5531, 5548, 5555.

plain that the words "or final disposition" are intended to include the act whereby the debtor's title is passed to another when a sale is not required. No doubt, the terms "sale or final disposition," explained as they are by the context, are comprehensive of every act of disposal, whether by sale or otherwise, which operates as an enforcement of the lien or preference.

But we do not perceive anything in the clause which suggests that the time when the lien is obtained has any bearing upon when the property must be freed from it to avoid an act of bankruptcy. On the contrary, the natural and plain import of the language employed is that it will suffice if the lien is lifted five days before a sale or final disposition of any of the property affected. This is the only point of time that is mentioned, and the implication is that it is intended to be controlling.

To enforce a different conclusion counsel for the petitioning creditor virtually contends that the clause has the same meaning as if it read "and having failed to vacate or discharge the preference at least five days before a sale or final disposition of any of the property affected, or at most not later than five days before the expiration of four months after the lien was obtained." But we think such a meaning cannot be ascribed to it without rewriting it, and that we cannot do. The contention puts into it an alternative which is not there, either in terms or by fair implication, and to which Congress has not given assent. Indeed, it appears that in the early stages of its enactment the bankruptcy bill contained a provision giving the same effect to a failure to discharge the lien within a prescribed period after it attached as to a failure to discharge it within a designated number of days before an intended sale, and that during the final consideration of the bill that provision was eliminated and the one now before us was adopted. This, of course, lends strength to the implication otherwise arising that the clause names the sole test of

when the lien must be vacated or discharged to avoid an act of bankruptcy.

The contention to the contrary is sought to be sustained by a reference to §§ 3b, 67c and 67f. But we perceive nothing in those sections to disturb the plain meaning of § 3a (3). It defines a particular act of bankruptcy and purports to be complete in itself, as do other subsections defining other acts of bankruptcy. Section 3b deals with the time for filing petitions in bankruptcy and limits it to four months after the act of bankruptcy is committed. It says nothing about what constitutes an act of bankruptcy, but treats that as elsewhere adequately defined. Sections 67c and 67f deal with the retrospective effect of adjudications in bankruptcy, the former declaring that certain liens obtained in suits begun within four months before the filing of the petition shall be dissolved by the adjudication, and the latter that certain levies, judgments, attachments and other liens obtained through legal proceedings within the same period shall become null and void upon the adjudication. Both assume that the adjudication will be grounded upon a sufficient act of bankruptcy as elsewhere defined, and give to every adjudication the same effect upon the liens described whether it be grounded upon one act of bankruptcy or another. And what is more in point, there is no conflict between § 3a (3) and the sections indicated. All can be given full effect according to their natural import without any semblance of interference between § 3a (3) and the others.

But it is said that unless § 3a (3) be held to require the extinguishment of the lien before the expiration of four months from the time it was obtained the result will be that in some instances the lien will not be dissolved or rendered null through the operation of §§ 67c and 67f, because occasionally the full four months will intervene before an act of bankruptcy is committed and therefore before a petition can be filed. Conceding that this is so,

one of the parties resided, this court is only concerned with the jurisdiction of the District Court as a Federal court; whether appellant is entitled to the relief sought is not a jurisdictional question in the sense of § 238.

When the matter in controversy is of the requisite value and diverse citizenship exists, the question is simply whether the case is cognizable in the particular District Court in which the case is brought.

Section 57, Judicial Code, makes suits to remove any encumbrance, lien or cloud upon title to real or personal property cognizable by the District Court of the district in which the property is situated regardless of residence of the parties and process for service of the non-resident defendants by notification outside of the district or by publication.

The provision in § 57, Judicial Code, respecting suits to remove clouds from title embraces a suit to remove a cloud cast upon the title by a deed or instrument which is void upon its face when such suit is founded upon a remedial statute of the State, as well as when resting upon established usages and practice of equity.

As construed by the highest court of Mississippi, § 975, Rev. Code of 1871 of that State entitles the rightful owner of real property in that State to maintain a suit to dispel a cloud cast upon the title thereto by an invalid deed, even though, under applicable principles of equity, it be void on its face.

In Mississippi, as declared by its highest court, the judgment of a special court of eminent domain may be challenged by a bill in equity upon the ground that the condemnation is not for a public purpose, and if other elements of Federal jurisdiction are present the case is one to remove cloud upon title and, under § 57, Judicial Code, the case is cognizable in the District Court of the district in which the property is situated although neither of the parties reside therein.

THE facts, which involve the jurisdiction of the District Courts of the United States under § 57, Judicial Code, are stated in the opinion.

Mr. Gregory L. Smith, with whom *Mr. Henry L. Stone* was on the brief, for appellant.

Mr. Rush Taggart, with whom *Mr. J. B. Harris* and *Mr. George H. Fearons* were on the brief, for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

By a bill in equity exhibited in the District Court the appellant seeks the annulment of three judgments of special courts of eminent domain in Harrison, Jackson and Hancock Counties, Mississippi, purporting to condemn portions of its right of way in those counties for the use of the appellee. According to the allegations of the bill, when given the effect that must be given to them for present purposes, the case is this: The appellant has a fee simple title to the land constituting the right of way and is in possession, and the appellee is asserting a right to subject portions of the right of way to its use under the three judgments, recently obtained. The appellant insists, for various reasons fully set forth, that the judgments were procured and rendered in such disregard of applicable local laws as to be clearly invalid, and that they operate to becloud its title. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, the right of way is within the district in which the bill was filed, and the appellant and appellee are, respectively, Kentucky and New York corporations. The prayer of the bill is, that the judgments be held null and void and the appellee enjoined from exercising or asserting any right under them. Appearing specially for the purpose, the appellee objected to the District Court's jurisdiction, upon the ground that neither of the parties was a resident of that district and that the suit was not one that could be brought in a district other than that of the residence of one of them without the appellee's consent. The court sustained the objection, dismissed the bill, and allowed this direct appeal under § 238 of the Judicial Code.

We are only concerned with the jurisdiction of the District Court as a Federal court, that is, with its power to entertain the suit under the laws of the United States.

Fore River Shipbuilding Co. v. *Hagg*, 219 U. S. 175; *United States* v. *Congress Construction Co.*, 222 U. S. 199; *Chase* v. *Wetzlar*, 225 U. S. 79, 83. Whether upon the showing in the bill the appellant is entitled to the relief sought is not a jurisdictional question in the sense of § 238 and is not before us. *Smith* v. *McKay*, 161 U. S. 355; *Citizens' Savings & Trust Co.* v. *Illinois Central Railroad Co.*, 205 U. S. 46, 58; *Darnell* v. *Illinois Central Railroad Co.*, 225 U. S. 243.

As the matter in controversy is of the requisite value and the parties are citizens of different States, the suit manifestly is within the general class over which the District Courts are given jurisdiction by the Judicial Code, § 24, cl. 1; so the question for decision is, whether the suit is cognizable in the particular District Court in which it was brought.

In distributing the jurisdiction conferred in general terms upon the District Courts, the code declares, in § 51, that, "except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." If this section be applicable to suits which are local in their nature, as well as to such as are transitory (as to which see *Casey* v. *Adams*, 102 U. S. 66; *Greeley* v. *Lowe*, 155 U. S. 58; *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105; *Kentucky Coal Lands Co.* v. *Mineral Development Co.*, 191 Fed. Rep. 899, 915), it is clear that the District Court in which the suit was brought cannot entertain it, unless one of the six succeeding sections provides otherwise, or the appellee waives its personal privilege of being sued only in the district of its or the appellant's residence. *In re Moore*, 209 U. S. 490;

Western Loan Co. v. *Butte & Boston Mining Co.*, 210 U. S. 368.

The appellant relies upon § 57, one of the six succeeding sections, as adequately sustaining the jurisdiction. This section reads as follows:

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal prop-

erty against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

It will be perceived that this section not only plainly contemplates that a suit "to remove any incumbrance, lien or cloud upon the title to real or personal property" shall be cognizable in the District Court of the district wherein the property is located, but expressly provides for notifying the defendant by personal service outside the district, and, if that be impracticable, by publication. The section has been several times considered by this court, and, unless there be merit in an objection yet to be noticed, the decisions leave no doubt of its applicability to the present suit, even though both parties reside outside the district. *Greeley* v. *Lowe,* 155 U. S. 58; *Dick* v. *Foraker, Id.* 404; *Jellenik* v. *Huron Copper Co.,* 177 U. S. 1; *Citizens' Savings & Trust Co.* v. *Illinois Central Railroad Co.,* 205 U. S. 46; *Chase* v. *Wetzlar,* 225 U. S. 79.

The appellee, after asserting that each of the judgments is void upon its face if the attack upon it in the bill is well taken, calls attention to the general rule that a bill in equity does not lie to cancel, as a cloud upon title, a conveyance or instrument that is void upon its face, and then insists that § 57 must be regarded as adopted in the light of that rule and as not intended to displace it or to embrace a suit brought in opposition to it. The difficulty

with this contention is that it seeks to make the usages of courts of equity the sole test of what constitutes a cloud upon title, so as to bring a suit to remove it within the operation of § 57, and disregards the bearing which the state law rightly has upon the question. As long ago as 1839 this court had occasion, in *Clark* v. *Smith*, 13 Pet. 195, to consider whether a Federal court sitting in the State of Kentucky could entertain a suit to remove a cloud from the title to real property in that State where the right to such relief depended upon a remedial statute of the State; and in the opinion, which fully sustained the jurisdiction, the court pointed out that the nature of the right was such that it could only be enforced in a court of equity, and then said (p. 203): "Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature. . . . The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the Chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts; on the contrary, propriety and convenience suggest, that the practice should not materially differ, where titles to lands are the subjects of investigation. And such is the constant course of the Federal courts." The principle of that decision has been reaffirmed and applied in many cases, one being *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405. It was a suit in the Circuit Court for the District of Indiana to remove a cloud from title in virtue of a statute of that State, and the objection was interposed that the deed sought to be

canceled was void upon its face and therefore afforded no basis for such a suit in a Federal court. But this court pronounced the objection untenable, saying (p. 410): "While, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the legislation of the State in which the court sits to ascertain what constitutes a cloud upon the title, and what the state laws declare to be such the courts of the United States sitting in equity have jurisdiction to remove." Citing *Clark* v. *Smith, supra.* See also *Cowley* v. *Northern Pacific Railroad Co.*, 159 U. S. 569, 582. There are many state statutes of this type, and our decisions show that their enforcement in the Federal courts is subject to but three restrictions: 1. The case must be within the general class over which those courts are given jurisdiction. 2. A suit in equity does not lie in those courts where there is a plain, adequate and complete remedy at law. 3. In those courts there can be no commingling of legal and equitable remedies, or substitution of the latter for the former, whereby the constitutional right of trial by jury in actions at law is defeated. Judicial Code, §§ 24 (cl. 1) and 267; *Whitehead* v. *Shattuck*, 138 U. S. 146, 152, 156; *Greeley* v. *Lowe*, 155 U. S. 58, 75; *Wehrman* v. *Conklin, Id.* 314, 323; *Lawson* v. *United States Mining Co.*, 207 U. S. 1, 9.

We conclude that the provision in § 57 of the Judicial Code, respecting suits to remove clouds from title, was intended to embrace, and does embrace, suits of that nature when founded upon the remedial statutes of the several States, as well as when resting upon established usages and practice in equity.

The State of Mississippi has such a statute. Code of 1906, § 550. Although originally more restricted (Hutchinson's Code, p. 773; Rev. Code 1857, p. 541, art. 8), it has read as follows since 1871 (Rev. Code 1871, § 975):

"When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title canceled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not."

While we have not been referred to any decision of the Supreme Court of the State passing directly upon the question, whether a conveyance or other evidence of title void upon its face is within the purview of this statute, the decisions of that court brought to our attention show that it has treated the statute as embracing conveyances described as "void"—whether the invalidity was shown upon the face of the instrument being left uncertain—*Ezelle* v. *Parker*, 41 Mississippi, 520; *Wofford* v. *Bailey*, 57 Mississippi, 239; *Drysdale* v. *Biloxi Canning Co.*, 67 Mississippi, 534; *Preston* v. *Banks*, 71 Mississippi, 601; *Wildberger* v. *Puckett*, 78 Mississippi, 650; and also that it regards the statute as very comprehensive and materially enlarging existing equitable remedies. In *Huntington* v. *Allen*, 44 Mississippi, 654, 662, it was said: "The statute in reference to the removal of clouds from title, enlarges the principle upon which courts of equity were accustomed to administer relief. It is very broad, allowing the real owner in all cases, to apply for the cancellation of a deed or other evidence of title, which casts a cloud or suspicion on his title. . . . The terms used in the statute, expressive of the scope of the jurisdiction, viz., 'cloud,' 'doubt,' 'suspicion,' quite distinctly imply that the instrument which creates them is apparent rather than 'real;' is 'semblance' rather than substance; obscures rather than

destroys or defeats." In *Cook* v. *Friley*, 61 Mississippi, 1, 4, it was further said: "The statute . . . not only authorizes the real owner to file his bill to cancel a paper title, but also to remove the cloud, doubt or suspicion which may spring from the assertion of claim or pretense of right or title thereto by the defendant, who without any muniment of title may assert a claim or pretend to have right or title. The purpose was to give the real owner a remedy against one who asserts any claim or pretends to have any right or title to such owner's land, in analogy to the right of action by the canon law for jactitation of marriage. The real owner is entitled to protection against jactitation of title to the disparagement of his real ownership. He may bring into court one who asserts any claim or pretends to have any right or title to his land, and require him to vindicate his claim or submit to its extinguishment by decree of the court." And in *Peoples Bank* v. *West*, 67 Mississippi, 729, 740, the court concluded its opinion with the statement: "We know of no line by which the jurisdiction of the court is limited other than that prescribed by the law which confers it. When the complainant shows a perfect title, legal or equitable, and the title of the defendant is shown to be invalid, it is, in the nature of things, a cloud upon the title of complainant, and should be canceled."

In view of these decisions, we think the statute must be regarded as entitling the rightful owner of real property in the State to maintain a suit to dispel a cloud cast upon his title by an invalid deed or other instrument, even though it be one which, when tested by applicable legal principles, is void upon its face.

The judgments sought to be canceled as clouds upon the appellant's title were rendered by special courts of eminent domain, each composed of a justice of the peace and a jury. According to the statute controlling such proceedings (Miss. Code, 1906, c. 43) the special court is not

permitted to quash or dismiss the proceeding for want of jurisdiction or for any other reason, or to inquire whether the applicant has a right to condemn or whether the contemplated use is public, but "must proceed with the condemnation" (§§ 1862, 1865, 1866); and, while an appeal lies to the Circuit Court, a supersedeas is not permitted, and upon the appeal the Circuit Court is restricted, like the special court, to an ascertainment of the compensation to be paid to the owner (§ 1871). A form of judgment is prescribed, which contains blanks for a description of the property and a recital of the compensation awarded, and then declares: "Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application" (§ 1867). An affirmative provision to the same effect also appears in the statute (§ 1868). Considering these statutory provisions and § 17 of the state constitution which declares that the question whether the condemnation is for a public use shall be a judicial question, the Supreme Court of the State holds that "the only question which can be raised in the eminent domain court, and the only jurisdiction confided to it, is the jurisdiction to ascertain the amount of damage sustained by the party whose lands are sought to be taken;" that "a new issue, involving a new question and new pleadings, cannot be raised in the appellate tribunal, that is to say, in the circuit court;" that the owner "may litigate the right to take his property at any time before acceptance of the compensation, or before the waiver of his right to have the question of the use judicially determined;" that "neither the constitution nor the laws of the State provide any particular tribunal in which this question shall be determined, nor is it a matter of any particular concern in what court the question shall be settled, provided it be determined in that forum which is capable of deciding it," and that the

appropriate mode of litigating the question is by a suit in equity challenging the right of the condemnor to enter under the judgment of the court of eminent domain. *Vinegar Bend Lumber Co.* v. *Oak Grove & Georgetown Railroad Co.*, 89 Mississippi, 84, 107, 108, 110, 112. Thus it will be perceived that under the law of the State, as declared by its court of last resort, the judgment of a special court of eminent domain may be challenged by a bill in equity upon the ground that the condemnation is not for a public purpose. This being so, and the elements of Federal jurisdiction being present, the litigation may, of course, be had in a Federal court. One of the grounds upon which the judgments are challenged in the present bill is that the condemnation is not for a public purpose. If this ground be well taken, as to which we intimate no opinion, the judgments apparently confer upon the appellee a right in the appellant's right of way to which the appellee is not entitled.

We conclude that the suit is one to remove a cloud from title within the meaning of § 57 of the Judicial Code, and is cognizable in the court below, although neither of the parties resides in that district.

Decree reversed.

GILSON *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 207. Submitted May 6, 1914.—Decided June 8, 1914.

The settled rule of this court that the concurring findings of two courts below will not be disturbed, unless shown to be clearly erroneous, applies where the evidence is taken before an examiner. *Texas & Pacific Railway Co.* v. *Louisiana Railroad Commission*, 232 U. S. 338.

Quære, as to what is the effect on a commuted homestead entry under § 2301, Rev. Stat., of an agreement for alienation made after entry and before commutation; and see *Bailey* v. *Sanders*, 228 U. S. 603. 185 Fed. Rep. 484, affirmed.

THE facts, which involve the validity of a patent of the United States for a tract of land issued under a homestead entry, are stated in the opinion.

Mr. Wade H. Ellis, Mr. Ira P. Englehart, Mr. Allen S. Davis and *Mr. George B. Holden* for appellant:

The evidence having all been taken before a special master, the rule that appellate courts will give great weight to findings of trial courts on questions of fact does not apply.

After Landis had made his homestead filing, he had a right to make an agreement to sell the land and then commute his entry and purchase the land. He did not make final proof under the homestead statute, but purchased the land under § 2301 of Revised Statutes. *Adams* v. *Church*, 193 U. S. 510; *Williamson* v. *United States*, 207 U. S. 425.

The evidence is insufficient to justify the conclusion that there was any agreement between Landis and Gilson before Landis filed on the land that Landis was to sell the land to Gilson. Even though Landis was guilty of fraud, there is insufficient evidence that Gilson was a party thereto to authorize cancellation of patent after title thereto has vested in him.

Mr. Assistant Attorney General Knaebel and *Mr. S. W. Williams* for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an equity action brought by the United States against appellant to cancel a patent issued to one Daniel

Landis for a tract of one hundred and twenty acres of land in Yakima County, in the State of Washington, afterwards conveyed by Landis to appellant. Landis made a homestead entry in November, 1899, under § 2289 of the Revised Statutes as amended by act of March 3, 1891, c. 561, 26 Stat. 1095, 1098; in November, 1902, he commuted the entry and purchased the land under § 2301 as amended by the same act; and in July, 1903, he received a patent. Upon the day on which he made the commutation entry he gave a mortgage upon the land to appellant, and from that date ceased to live upon it, and as soon as the patent was issued he made the conveyance to appellant. The grounds of the action were: that Landis did not enter the land in good faith, but for the purpose and with the intent of acquiring title to it for appellant and at his instigation; that the residence and improvements were not sufficient; that the affidavit upon which Landis' original application was allowed was false and fraudulent, in that he did not make the application in good faith for the purpose of actual settlement and cultivation, but made it for the benefit of appellant, with whom the entryman was then acting in collusion for the purpose of giving to appellant the benefit of the entry; that the proof of settlement and cultivation offered in support of the commutation entry was false and fraudulent, in that the entryman had not made settlement in November, 1899, or at any other time, had not built a house, except a partially completed shanty, had not resided on the land, and had not broken thirteen acres and cultivated three acres as alleged in his final proofs; and that the statement made in his affidavit that he had not alienated any part of the land was also false, in that he had alienated or agreed to alienate it to appellant.

The trial court found that Landis made the homestead entry at appellant's instigation and for his benefit; that the evidence on which the register and receiver allowed

the commutation entry included sworn statements by Landis and two witnesses to the effect that the claimant had lived continuously on the land and made improvements, including a corral and chicken house, and that he had cultivated three acres for three seasons; that this was a false statement, there having been no plowing or cultivation except during the third year; that the land was dry sage-brush land, not productive without irrigation; that Landis made only a pretence of settlement and a show of improving the land, in order to satisfy the scruples of the witnesses upon whom he depended to make final proof; and further, that appellant was cognizant of every detail of the transaction from its inception to the issuance of patent, and, indeed, directed the proceedings at every step, and therefore could not claim to be a *bona fide* purchaser.

The Circuit Court of Appeals concurred in this view of the facts, and therefore sustained the conclusion reached by the trial court that the patent should be canceled, without finding it necessary to consider the question of law, suggested by appellant, that inasmuch as final proof was not made under § 2291 but under § 2301 of the Revised Statutes, the fact that the claimant had made an agreement before commutation to convey the land to another would not affect the validity of the title obtained from the United States, because § 2301 prescribes as requisite to commutation, proof only that the entryman has made settlement, cultivation, and residence for fourteen months, and does not require him to make oath that he has not alienated any portion of the land. The decree was affirmed (185 Fed. Rep. 484), and the present appeal was taken.

Upon the question of fact as to the fraudulent nature of the proof upon which the commutation entry was allowed, we have the concurring findings of two courts, which, according to the settled rule, will not be disturbed by this court unless clearly shown to be erroneous. *Stuart*

v. *Hayden*, 169 U. S. 1, 14; *Towson* v. *Moore*, 173 U. S. 17, 24; *Dun* v. *Lumbermen's Credit Assoc.*, 209 U. S. 20, 23; *Washington Securities Co.* v. *United States*, *ante*, p. 76.

In behalf of appellant it is urged that this rule does not apply where the evidence is taken before an examiner, as was done in this case. The rule, however, is subject to no such exception; indeed, prior to the adoption of the new Equity Rules (226 U. S., Appendix, Rule 46), the evidence in equity actions was usually taken before a master or examiner. And in *Texas & Pacific Ry.* v. *Louisiana Railroad Commission*, 232 U. S. 338, where the findings of the special master who heard the testimony were set aside by the Circuit Court, and the conclusions of that court were concurred in by the Circuit Court of Appeals, we deemed the case a proper one for applying the general rule.

In the present case, not only does the argument submitted in behalf of appellant fail to show clear ground for disturbing the concurring findings of the two courts, but it raises no reasonable doubt of their correctness.

This renders it unnecessary to deal with the question raised as to the effect of an agreement for alienation made after entry and before commutation. However, it is settled adversely to the contention of appellant by our recent decision in *Bailey* v. *Sanders*, 228 U. S. 603, 608.

Decree affirmed.